

U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Date Issued: December 28, 2000
Case No: 2000-STa-4

In the Matter of
DALE A. BECKER
Complainant,
v.
WEST SIDE TRANSPORT, INC.,
Respondent.

APPEARANCES:

Paul O. Taylor, Esquire
4260 Heine Strasse
Eagan, MN 55122
For the complainant

Chris Scheldrup, Esquire
2720 First Avenue, N.E.
Cedar Rapids, IA 52402
For the respondent

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §§ 31105 (the Act), and the regulations promulgated thereunder, 29 C.F.R. Part 1978. The hearing was held before the undersigned on March 28 and 29, 2000.

Complainant, Dale A. Becker, (Mr. Becker or Complainant, herein) filed a timely complaint with the Secretary of Labor (Secretary, herein,) on May 18, 1999, alleging that West Side Transport, Inc. (West Side or Respondent, herein, discriminated against him in violation of the whistleblower provisions of the Act. The Secretary, acting through her duly authorized agents in the Occupational Safety and Health Administration, (OSHA, herein) investigated the complaint and determined that there was no reasonable cause to believe the

respondent had violated the whistleblower provisions. (ALJX 1a-b).¹

Mr. Becker contested the Secretary's decision under cover of a letter dated October 29, 1999, and appealed her determination. (ALJX 2a-b). He waived the procedural time constraints under the Act on November 30, 1999. (ALJX 6). Pursuant to appropriate notices (ALJXs 3-9), I conducted a formal hearing in Iowa City, Iowa, on March 28 and 29, 2000, at which time the parties were given the opportunity to present both testimony and documentary evidence. The record remained open until July 3, 2000, when the simultaneous briefs of the parties were filed.

The findings of fact and conclusions of law which follow are based upon the testimony and documentary evidence presented and arguments of counsel. The following exhibits were received into evidence at the hearing: ALJX 1-9; JX 1-7; CX 1-5; RX C, F-H. JX 3B and RX H were received pursuant to order after the hearing and are admitted into evidence. RX A, B, D, E and part of F were rejected.

ISSUE

1. Whether West Side Transport, Inc. discharged Dale A. Becker as a result of safety complaints protected by the Act.
2. Whether or not he quit, West Side Transport was obligated to either continue his employment or rehire him.

FINDINGS OF FACT

Stipulations:

The parties stipulate, (JX 1) and I so find:

1. Complainant Dale A. Becker is an individual residing at Lake City, Minnesota.
2. Respondent West Side Unlimited Corporation is a corporation transacting business under the name "West Side Transport, Inc." with its principal place of business located at 4201 - 16th Avenue, S.W., Cedar Rapids, IA 52409-9129.
3. Respondent is a "commercial motor carrier" within the meaning of 29 C.F.R. § 1978. 10 1 (e) and a "motor carrier" as defined at 49 U. S. C. § 13 102(12).

¹References to ALJX, JX, CX, and RX refer to exhibits of the administrative law judge, joint exhibits, and those of complainant, and respondent, respectively. The transcript of the hearing is cited as "T" or "2T" for the first and second days of the hearing, respectively, followed by the page number.

4. From August 3, 1998 to about November 20, 1998, Complainant was an employee of Respondent as defined in within the meaning of 49 U.S.C. § 31101(2) and 29 C.F.R. § 1978. 101(d).

5. West Side is an employer within the meaning of 49 U.S.C. § 31101(3).

6. Complainant filed a complaint with the Secretary of Labor on May 14, 1999, alleging that the Respondent had discharged him pursuant to 49 U.S.C. § 31105(b)(1). The complaint was timely filed.

7. On September 30, 1999, the Secretary of Labor issued a preliminary order in this matter pursuant to 49 U.S.C. § 31105(b)(2)(A).

8. On October 29, 1999, the Complainant timely filed objections to the Secretary's preliminary findings and order pursuant to 49 U.S.C. § 31105(b)(2)(B).

9. The Office of Administrative Law Judges, United States Department of Labor, has jurisdiction over the parties and subject matter of this proceeding.

10. Complainant operated commercial motor vehicles in interstate commerce for Respondent with a gross vehicle weight rating of at least 10,000 pounds.

11. Complainant's gross wages during his employment with Respondent totaled \$9,983.78. The parties stipulate to the admissibility of Joint Exhibit I which are payroll records of the Respondent pertaining to Complainant.

12. The parties stipulate to the admissibility of Joint Exhibit 2 which are Complainant's daily logs while he was employed by Respondent. Complainant prepared the records of duty status in the ordinary course of business.

13. The parties stipulate to the admissibility of Joint Exhibit 3 which are Complainant's contemporaneous notes relating to shipments he transported.

14. The parties stipulate to the admissibility of Joint Exhibit 4 which is a copy of a letter delivered by Complainant to management officials of Respondent on or about November 21, 1999.

15. The parties stipulate to the admissibility of Joint Exhibit 5 which is a copy of a letter send by Andie Vogt to Complainant on or about November 20, 1998.

16. The parties stipulate to the admissibility of Joint Exhibit 6 which is a copy of Respondent's policy manual which was provided to Complainant.

17. The parties stipulate to the admissibility of Joint Exhibit 7 which is a list of Iowa based motor carriers.

Testimony and Document Evidence:

Dale A. Becker

Mr. Becker testified that he had been a long distance truck driver since 1964, driving all types of trucks including dump trucks, refrigerated trailers, flatbed trailers and hauling machinery. (T 38) He owned "several" truck lines known as "Becker Trucking" which at one time had four trucks. (T 39) He was a dispatcher, mechanic, road planner, a mechanic/maintenance, and payroll clerk for Becker Trucking. He also drove full time and did everything else. (T 39) Since 1964, he has never been involved in an accident in a commercial vehicle, (T 39) and has never had a moving violation. (T 39)

Mr. Becker testified that after being terminated from Kirk Company, he had seen West Side Transport trucks and went to see them because they had "the nicest looking Fleet of trucks on the highway." (T 40) He was then living in Marion, Iowa, a suburb of Cedar Rapids, where he met with a recruiter, Tony Rowe. (T 40) Mr. Becker filled out an application and was hired on August 7, 1998, which was followed by an attendance at an orientation program for two or three days. (T 41) Presentations were made on safety issues, rules and regulations of the Department of Transportation (DOT), the company's rules and regulations, and the "QUALCOM" which was a communication system from the truck to the trucking company. (T 42) He also went through a pre-employment screening which involved a urine test and a physical for hernia and checking for heart rate under exercise. (T 42) After having been shown Joint Exhibit 3, a running log of all of his trips at both prior employer, Kirk Trucking, and West Side, he corrected the dates to show that he started employment on August 3, 1998; was assigned truck number 95020 and made his first trip on August 7, 1998 in that truck. (T 43-44; JX-3) West Side did not require any loading or unloading, and 50 percent of the time he would lower the dolly on the trailer, unhook it, and move his tractor to another one, hook it up and roll which they call "drop and hook" (T 46), for which there is not much driver waiting time. (T 46) At that time, Mr. Becker's supervisor was Craig Trpkosh (T 46), and on a day to day basis he reported to the dispatcher, Ted Leslie. (T 47)

A trip sheet from September 23, 1998 through September 25, 1998, showed a load from Columbus, Indiana with three stops, emptying in Norfolk, Virginia (T 48; CX-2). Page 2 stated: "I hooked up this preloaded trailer load of hurricane relief supplies, at 2:45 a.m., 9/26/98. Arrived at Lowe's store at 9:30 p.m. on 9/26/98. Dispatch said I had to leave here by 10:00 p.m., but nobody was here to unload." (T 49; CX-2) He testified that during the time periods recounted above, he did drive while his ability and alertness were impaired due to fatigue or sleepiness, and upon delivering his load in Norfolk he was dispatched to Williamsburg, Virginia to pick up a load of beer going to Randall-Gastonia, North Carolina. (T 49-50) At that time he understood he had two days over a weekend to get rest, but after he got the beer loaded at Williamsburg, he went to a truck stop to shower and clean up, and have supper. When he came out at about 10:00 or 10:30, the QUALCOM satellite system light was blinking off and on in the truck. He responded to the dispatcher call returning to the restaurant to use a telephone. He was then told to take the beer load from Randall-Gastonia, North Carolina to North Wilkesboro terminal; drop that trailer and hook up to an empty trailer. From there, he was to proceed to load distribution center in Olden, North Carolina and pick up a trailer that was going to be preloaded there while dropping the empty trailer. (T 51) He was then to proceed from Lowe's distribution center in Olden, North Carolina to Mobile, Alabama for arrival on Saturday night by 10:00 p.m. on 9/26/98. (T 52)

Mr. Becker testified he informed the dispatcher he had been on duty so many hours that day, that he was tired and looking forward to a leisurely weekend not having to drive so hard; that the dispatcher said he would try to find somebody else, that he would call him back in a half hour and Mr. Becker said that that was okay. A half hour later, he called the dispatcher back explaining that he would not be able to take the load legally. He wouldn't be able to do it physically, because his previous hours on duty and the hours it would take to get the load down there. (T 52-53) The dispatcher told Mr. Becker that he was the only person he had to cover the load, and the load had to be covered. He told Mr. Becker that "somehow you have to do it somehow." (T 53) The dispatcher informed Mr. Becker that he was hauling hurricane relief supplies. (T 54) Mr. Becker testified that during the haul he fell asleep driving many times, but that he did not explain that to anyone at West Side because when the dispatcher told him he was the only person that he had to cover the load, he felt that "he was depending on me."²

Later, Mr. Becker had dropped a load of supplies at a Lowe's distribution center in Palestine, Texas, and was told to take an empty trailer to Lufkin, Texas, where he was to pick up a load of paper and to go to American Color at Sylacauga, Alabama. (T 55) Reading from his log book, Mr. Becker testified that his handwriting stated:

I arrived Donahue Industries, Lufkin, Texas, 10/13/98, 9:30 a.m. Load not ready until 1:30 a.m. on 10/14/98. Dispatch said I would receive layover pay." (T 56)

The reason that he arrived at Lufkin, Texas at 9:30 a.m. on October 13, 1998, and waited until 1:30 a.m. on October 14, was that upon being dispatched from delivering the load at Palestine, Texas which was delivered sometime during the night the day before, he had been told by Ted Leslie that when he dropped the load at Palestine, Texas to Lufkin, he would pick up a load that was ready to go. However, he ended up sitting there at Lufkin, Texas waiting. In such circumstances, he would be "sitting and waiting" and would "sleep a little bit and you wake, and sleep a little bit and you wake up." (T 56) Finally, when they knocked on his door and said they were ready at 1:30 a.m., he was in a sound dead sleep, for "I dont know for how many, just a few hours." (T 57) After leaving at 1:30 a.m., even though he had been "off-duty the day before and part of the night" when it got to be 4:00 or 5:00 in the morning, he was still falling asleep driving but had to keep on driving to get the load to Sylacauga, Alabama.³ (T 57-58)

While he had enough hours under the "hours of service" regulations to deliver the shipment without a violation and the driver is responsible for managing his time to get enough sleep, Mr. Becker testified that if a driver can't pick up a load that's supposed to be ready at a certain place and he has to wait a long time to get it loaded, it affected his ability to manage his time to get enough sleep. (T 58)

²Mr. Becker basically drove illegally but did not call and tell the dispatcher that he was falling asleep. There was no employer violation.

³Again, there appears to be no evidence that he called in with a statement that he was unsafe driving at that point.

With regard to the final log at page 5 of CX-2, Mr. Becker testified that he unloaded at Mount Vernon, Texas with a dispatch to proceed to Paris, Texas to pick up a load of Campbell's Soup. He then had to be in Springfield, Missouri for delivery on 11/4/98 at 5:00 in the morning, which he did. (T 58-59) On his arrival with Campbell's Soup in Paris, Texas to pick up the load, they did not have a load number that he was supposed to have, and didnt have any paperwork that he was suppose to receive when "security made me leave the premises." (T 59) He then called Mr. Leslie to make some calls and suggested he return to the security guard and tell them that it was taken care of by the time he got there. He took his time, gave them a half hour's time to get the telephoning done, got back there and the security guard still did not want to let him through because he did not have the right kind of authority, and he could not enter the premises until he had the appropriate load number. (T 59) Following a six hour wait, he left Springfield, Missouri for Springdale, Arkansas, where he again found that he did not have a load waiting for him. (T 60) In the remarks section of page 6, Mr. Becker had written:

Truck empty at Springfield, Missouri, 7:00 a.m., 11/4/98. Sit in truck until 2:30 p.m. for dispatch load. Drive to Springdale, Arkansas. Sit and wait for load from 5:30 p.m., 11/4/98 until 1:00 a.m., 11/5/98. (T 60)

He also wrote "too many hrs. sitting around no pay." (CX-2 p. 6) Basically, he was awake from 7:00 a.m. on 11/4/98 until 1:00 a.m. on 11/5/98 with a nap in between, with a 10:00 p.m. appointment for Pleasant, Texas at Pilgrims Pride Corporation. He testified that he fell asleep many times a night driving down there, and that his wife was along under a 30 day permit. (T 61) He testified that "I would have had an accident that night because there was several times when she screamed and I was on the shoulder of the road. And at one time she hollered at me, and we were just about ready to hit a bridge. She was scared to death." (T 61) In a response to a question as to why he did not pull over and sleep, Mr. Becker stated that with the dispatcher like Ted Leslie that tells you you have an appointment at 10: 00, and says you better not ... miss your appointment." (T 61)⁴

By the time Mr. Becker got to Springdale, Arkansas, it was after Ted Leslie's work hours, and he had gone home for the day, so he talked to the dispatcher that was on duty at Cedar Rapids. (T 62) Mr. Becker told him to make a note to tell Ted Leslie the next morning that he had a problem getting the load, and it wasn't ready to load. He then called the dispatcher for C.H. Robinson, and told them of the problem who gave him his number. (T 62)

With regard to the shipment going through Mount Pleasant, Texas from Springdale, Arkansas, he later talked to Mr. Leslie from a truck stop at Paris, Texas (breakfast), where he figured he had enough time to eat and arrive shortly after 10: 00. First he called C.H. Robinson's broker, where he told them where he had been and what had happened during the night. The Robinson representatives called the consignee at Pilgrims Pride Corporation, Mount Pleasant, Texas, stating that he would call and tell them that he would be a little late. Upon calling Mr. Leslie, he related what had happened (T 66-67), to which Mr. Leslie allegedly stated: "I dont care what the broker told you, I told you you had a 10: 00 o'clock appointment and you better not be late or I'm going to write you up." (T 67) Mr. Becker testified that he and his wife cancelled his breakfast, which they had

⁴Again, it does not appear that he called in to report the direct safety problem.

already ordered, told the waitress they didn't have time to wait. They walked out and got there at approximately 9:35 before the 10:00 appointment. Upon his arrival, there was not room to unload his truck, and he had to wait until that time to get it unloaded. (T 68; JX-3; CX-5)

Mr. Becker also referred to notes that he had maintained with his locations and mileage. (JX 3A) He also noted that he had a book where he maintained a diary of stopping at restaurants, money spent, etc. with his wife. (T 70)⁵ He explained that JX-3 involves notes that he makes on a daily basis in a notebook that he has. (T 72) Mr. Scheldrup stated that at the deposition he acknowledged that he had other records (T 73), and that he later told him he gave him everything that existed at the time. (T 74) Now in reference to his diary or his wife's diary, he didn't feel she would give it to him. Mr. Becker again explained that his wife's diary information had information where they put down what they had done during the month for the month of October only. (T 75-76; JX 8)

Mr. Becker next testified regarding the shipment that originated in Clinton, Iowa and was delivered to Honeybrook, Pennsylvania (CX-2, p.7, pickup 11/14/98, and was emptied 11/16/98) for A.D.M. Foods. He wrote "I waited four hours for load to be loaded." which took from 8:00 a.m. in Clinton, Iowa. (T 78) He had been told in Cedar Rapids by the dispatcher the load would be ready. It turned out that the load was not ready, and when it was examined it was overweight and they had to change the load to get it "legal," and this resulted in driving while he was sleepy. (T 78) Again, it affected his ability to be safe on the road.⁶

Complainant's Exhibit 2 consists of trip sheets with the four particular incidents where complainant alleges that he had informed management that he was tired and they continued to have him operate the vehicle on trips. (T 156) Confirming that the trip that Mr. Becker would be sent both to payroll and other parts of the company including safety, Mr. Becker was asked whether he made reference in the loading delays that he had encountered during those trips, to "being too tired to drive." He confirmed that he did not make such a reference. (T 157) Employer's counsel also asked whether he did make reference to getting paid for the periods of time that he was waiting, and he did confirm that such matters were raised, since he pointed out that on page 6, Mr. Becker had written "too many hours sitting around, no pay." There was no reference to being tired or posing a danger to himself or others. (T 159) When asked why he would send such a statement to the payroll department, Mr. Becker noted that he had complained about that to the dispatcher verbally. (T 159) However, Mr. Becker confirmed that he had received a copy of the handbook at the time of his hiring and orientation; that the company would not allow its drivers to violate Federal DOT regulations, and he was not to run illegal. (T 159-60)

⁵The notes that Mr. Becker's wife maintained during the month that she travelled with him, marked "Gerry Becker trip in truck 10-98, with notes on Friday, October 9, 1998 - Saturday, November 7, 1998. (JX 3B, See fn. 7, p. 13, *infra*.)

⁶Again, there is no evidence that he called in regarding safety on the road and kept driving.

After discussing the load that he had taken for hurricane relief and that he did not want to drive because he was tired (T 160), Mr. Becker told the dispatcher that he would not violate the law and drive tired. He denied that he said this. (T 161) However, he did admit that in his deposition he stated: "I'm not going to violate the law. I am personally responsible for the number of hours I drive. I could personally be held responsible for it, I'm not going to do it." (T 162) But he did say in response to the dispatcher and confirmed that he had not said that and that was "because I like to have a good relationship with my company and not have people mad at me." (T 164-65) Again in reviewing the deposition transcript, Mr. Becker was asked "Did he (the dispatcher) ever tell you you would be terminated or it would adversely affect your employment if you didn't take that load?" He had answered "No, he just said he didn't have anybody else he could depend on." (T 165) In short, they both recognized the uniqueness of the situation with the hurricane and he voluntarily decided to drive the miles. (T 165) Again, Mr. Becker did not report driving while unsafe on this trip.

Mr. Becker confirmed that the company had permitted him to take his wife on a 30-day trip with him but denied that it may have slowed down his ability to perform work, (T 169) but he also denied telling Mr. Leslie that it was part of his practice if he so desired to run longer hours that he would "simply throw . . . [his] . . . book down on the floor and drive to whatever . . ." he desired. (T 169)

Mr. Becker testified that Mr. Tim Whitney was Safety Manager of the company, and driving over hours while tired were safety issues; that Mr. Whitney had a open door policy and that in his dealings with him he seemed cooperative and interested in what he had to say. (T 169) He confirmed that at one time he called Mr. Whitney and told him that he was tired because of taking medications and Mr. Whitney told him to pull over to the side of the road and to rest. (T 170) Mr. Becker confirmed that while he had control over safety, he did not have control over what the dispatchers told the drivers. (T 170) He also confirmed that they had a right to call Mr. Whitney, in the event that they had problems with the dispatchers about the fatigue issue, and that the only time he ever called was over the medications. (T 171)

Mr. Becker confirmed that there was a policy not to contact customers directly. (T 171) While denying that he had contacted customers (T 175), he then confirmed he had contacted a broker with regard to a delivery to C.H. Robinson (T 175), claiming that he was told to do that. In support, he related a story of having talked to the broker the night before, who stated that he wanted to talk to him at 8:00 the next morning. He confirmed that he contacted the broker directly without first contacting the fleet manager to advise that he was going to be late. (T 178) He claims that he was told to tell the broker if there were any problems, and that the broker said to be sure and call him. (T 178)

Mr. Becker was asked whether or not he had filed for unemployment compensation at West Side, and he said no. (The implication being that Mr. Becker had quit. See Mr. Scheldrup's statement to that effect.) (T 181-83) This may be evidence that he believed he had quit, but it is not determinative of this matter.)

Mr. Becker testified that he wrote a letter to management of West Side Transport dated November 21, 1998 (JX 4, T 79). On November 19 or 20th, he had gotten back to the Cedar Rapids terminal with a load from Chicago. (T 79)

Mr. Becker drafted the letter to West Side Transport on November 21, 1998, that was six pages long. On the first page, he stated:

On Friday, 11/20/98, I spent several hours here to visit with management as to resolve some problems. The final answer I received from Brian Keenon was:

“This is what trucking is all about, maybe you just don’t fit in around here.”

I walked out and told him I would talk to the owner of the company.

He also stated on page 2:

I suggest you find a way to stop Drivers from Walking out, as we all know the expense of Hiring new ones.

At another point, he stated:

I asked you, Mr. Don Vogt, please give me a chance to help your Company to find a way to make all of the Drivers be happy. Please find enclosed a Copy of my Resume.

He recounted that he spent time on Friday with safety Director Mr. Tim Whitney; that he was told to call him on November 23, 1998 after lunch; and that he met with Vice President and C.O.O. of Transportation, Mr. Robert Cleppe. (JX. 4, p. 3)

This letter was written following return from Mr. Becker’s last trip which originated on or about November 19th in Chicago, and terminated finally in Cedar Rapids. (T 79) As to Mr. Becker’s original direct testimony, it does discuss the fact that he asked to be rerouted following several unsatisfactory aspects of the trip. At this point, Mr. Becker leaves out of this account the fact that he requested to be rerouted back to quit. I find that this reduced the weight to be given his testimony since he leaves out both the fact of it and why.

When Mr. Becker returned to Cedar Rapids on November 20, he first met with his dispatcher, Mr. Leslie. (T 80) Mr. Becker had brought Mr. Leslie the paperwork from the original load which was headed toward Des Moines, Iowa. Mr. Leslie informed Mr. Becker that he was to meet with Brian Cruise and Terry Golson (T 80), with whom he met, with Mr. Cruise, really doing the talking. He stated to Mr. Becker that they were tired of him always calling in and complaining; and that he thought it would be best if he looked for a different job. In terms of what he had called in about, it involved matters mentioned in the letter which included him ending up “always being short of time to get the loads hauled because he had so much waiting time.” Acknowledging that he did not know who else had the problem, there were so many times when his loads were not ready to be picked up such as the one in Clinton, Iowa, and different places. (T 81) Mr. Becker had suggested that he have a meeting with the load planners who make arrangements for loads to be delivered, to discuss the amount of time that was left to deliver a load, and to

consider the amount of time it takes to get a load loaded onto a truck in time for departure. (T 82) Weather conditions also have to be considered along with construction work. (Ibid)

Mr. Becker testified that Mr. Cruise said “Dale, I think your burned. You’ve been doing it so many years and I think you are just burned out.” He said “you know that that’s what trucking is all about.” (T 82) While stating that Mr. Cruise did not ask for his resignation, Mr. Becker said “I think it would be better if you looked for a different job.” Mr. Becker stated that he “didn’t want a different job” and was happy there, but he disabide that Mr. Becker then got mad and walked out, and slammed the door,” because I told him, I said I’m going to talk the man that owns this company.” (T 82-83)

Mr. Becker testified that later that day he also met with Mr. Whitney, reciting what had happened. Mr. Whitney told him to call him sometime Monday afternoon, which he did. He related to Mr. Whitney the same concerns that he had about waiting on loads and driving while sleepy. (T 84) Later, he also attempted to speak to Mr. Cloppe, but he didn’t have time speak with him about the same thing.

At one point I asked Mr. Becker directly about the calculation of hours that the allegation was not that he was driving excess hours. (T 90) Mr. Becker admitted that while there were times when it happened, that it was not all the time; that the major issue in the case was not that, but that he “was just driving half asleep to get the doggoned trucks delivered on time because of the delay in problems getting the loads loaded or picked . . . picked up or whatever.” (T 91) He also acknowledged that this had “something to do with the time periods that . . . [he] . . . was encountering fairly consistently, according to these records,” with loads not being ready at the time you were told to pick them up and at the time you actually left.” (T 91)

After Mr. Becker’s meeting with the West Side officials on November 20, he drove home for the weekend. He testified that in the meetings with Mr. Whitney, Mr. Cloppe, Mr. Cruise and Mr. Golson, or Mr. Leslie, he did not tell any of them he was quitting. He confirmed, though, that Brian Cruise had said “Dale, I think you should look for a different job, I think you can’t handle this one, you’re burnt out.” (T 105) With regard to Joint Exhibit 4, which he had hand delivered to West Side terminal to various recipients, (T 106), one of the dispatchers told him that he would make certain they all got their letters, which they did. Ibid. He then reviewed the letter with Mr. Taylor, estimating that he had spoken with Mr. Trpkosh and Mr. Cruise about the dispatch department “dozens of times.” (T 107) So he contacted Mr. Trpkosh in North Carolina more than once that week, that he was complaining about how he had to sit that particular time, wherever it was, an example is Lufkin, Texas, where he had to sit in a truck all day, waiting for a load where it was over 100 degrees. (T 107) He had been told to go and pick up the load, and they got there and it ended up there was no load to pick up. (T 107-108) He would call Mr. Cruise about driving while he was impaired due to fatigue or while he was sleepy many times (T 108), stating that the load planners and dispatchers were not using good judgment in setting times and location; (T 108), they were setting times when a load was not ready or when they did not have any idea when the truck would be loaded. (Ibid) He stated that he had a good driving record and history; and that is why he wanted to show Mr. Hoke his resume (T 110), and that he has problems sleeping when he is tired and upset; (T 110-111), that he was tired on one of the trips and had to make a 10:00 appointment the next morning, and that he was very tired. (T 111)

Mr. Becker denied having told anyone at West Side on Saturday, November 21, 1998, that he had quit. (T 112) He also stated that he did not have an understanding that he had been fired at that point. (T 112)

An issue concerning the delivery of the letter is whether it was delivered on November 21st or 23rd. (T 113)⁷ The company maintains that it first saw the letter on the 23rd. (T 114) Mr. Becker maintains that he delivered the five or six copies on Saturday, the 21st. (T 114) The names of the addressees were written on the envelopes to Tim Whitney, Craig Trpkosh, Debbie, and Mr. Don Hoke. (T 114) As stated above, they were given to the dispatcher.

Mr. Becker testified that his next communication with anybody from West Side was on Monday, he called to find out when he “was supposed to go some place.” (T 115) He called Ted Leslie for a dispatch to tell him he was ready to go. Mr. Leslie told him that his truck had been given to another driver, and that his clothes had been taken out, and were put into a cardboard box. He was told to check with some individual within the office as to where the box of clothes would be able to be found. (T 115-116) After the call with Leslie, he talked to Mr. Tony Rowe and told him that he had been taken out of his truck, and the disposition of his clothes. He stated that he asked how could he be reinstated without being “whatever.” Mr. Rowe said he would talk to management. He did on the next day. (T 116-117) Mr. Rowe informed Mr. Becker that he had a meeting with management and that “they didn’t want me around anymore.” (T 117)

On cross examination by Mr. Scheldrup, Mr. Becker testified that by the meetings he held on November 20, 1998, he believed that he was still employed; that he wrote a letter to management on November 21, and gave it to them on the 21st while actually returning to West Side on Monday, November 23, believing that he was still an employee, and just coming there to pick up his truck and go out on his next load. (T 140-141; JX 3)

The “11-20-98 vs. 11-26-98” Writing of “End Employment” Dispute:

Mr. Becker testified that he made his best effort to record the dates and mileage starting with David Kurk Trucking (misspelled Kirk in the record), usually recording the miles on the day that it was logged (T 142), the last page of which was the entry for November 20, 1998. (T 142) On that day he confirmed that he wrote down “End Employment.” (T 142; JX 3, p. 11/19/98 - 11/20/98) Mr. Becker was asked whether he actually wrote down 11/20/98 stating “end of employment,” (T 143) and a dispute arose over whether or not it was actually 11/20/98 or 11/26/98 due to markings on the date 11/20/98. On redirect, Mr. Becker was asked about a notation in JX 3, last page as to whether it was November 20th, 25th, or 26th. He responded that it looked like it was 11/26. (T 190) (I have discredited this.) He was then asked whether this date of 11/26 was the day he received the reply from Andie Vogt? He said yes, whatever the Wednesday was (November 25th).

⁷This relates to whether Mr. Becker actually quit on the 20th or not.

Mr. Becker was asked by the undersigned about the little mark over the zero in JX 3, and whether it was a six or a zero. He said he could not make out whether it was a six or a zero. (T 191) He made the entry on "eleven something '98, end employment", and responded that he made the entry after he had gotten the letter of May 20, a Friday. (T 192) With regard to actually writing the "End Employment," he states that he wrote it the next week after he got the letter in the mail. (T 193) They had some free handwriting said "Brian Cruise said I didn't fit in with operations," and that he did not recall whether he wrote it at the same time or a different time, but at least he wrote the date and "End Employment" after he received Andie Vogt's letter. (T 194) Again, I believe his confusion was, that he may have written the handwritten part ("Brian Cruise said I didn't fit in with operations.") after he received the letter, but I do not credit that he wrote the printed part and the date at that time for reasons stated above he wrote it when he concluded his trip on the 20th.

At the end of Mr. Becker's testimony, employer's counsel stated that at his deposition there were never any doubt that the notes set forth in JX 3, last page, referred to 11/20/98, and that any line over the "2" would be a product of xerox. (T 198) At that point, I asked for the original, at which time Mr. Taylor said it was left at Mr. Scheldrup's office. Mr. Scheldrup pointed out that it was returned to the complainant, and that they are now claiming they couldn't find the original. Mr. Taylor stated that he had the log books and Mr. Becker clarified that the notes involved were those of his mileages. I asked whether there were questions based upon the notes, and was informed that at the deposition there were such questions (T 199-200), and Mr. Scheldrup stated that it was clear that the date was the 20th and not the 26th. (T 201) A lengthy conversation ensued about the notes at which point I stated that the best evidence would be the document. (T 202) I informed them that I expected both parties to look for the notes and have an exchange with it and find out where it went. (T 205) As stated previously, the original of JX 3, Mr. Becker's notebook, was sent to me by Mr. Taylor for the claimant with a cover letter dated March 20, 2000 (mistakenly typed as March instead of April), and received by me on April 24, 2000.⁸

After reviewing the note in the original spiral notebook (JX 3B) in comparison with the copy made for Mr. Becker's deposition (JX 3a), I find as a matter of fact the date shown was originally 11/20/98 and that it was changed after the deposition to 11/26/98. I base this on the following analysis: In my review of the entire set of notes and the way that Mr. Becker writes different versions of the date the 20th in the various months preceding 11/20/98, I find that he frequently - but not always - makes the "two" larger than the "zero" in the number "20," and makes differing marks on the two and the zero. I find that the number recorded in his original notebook which was submitted to me post-hearing under cover of a letter dated March 20, (obviously an error and should have been dated April 20, 2000) which was received in my office on April 24, 2000, had a change marked on it to show "11-26-98" with a smudge or erasure mark over the "6" and part of the top of the "2". I find that it was marked after that page was copied for purposes of Mr. Becker's testimony as part of his deposition exhibit 1. I therefore find that he wrote "End Employment" on November 20, 1998 and conclude that this is evidence that he intended to quit his employment at West Side on that date as follows: 2. In the "original"

⁸The notebook was submitted under cover letter mistakenly dated March 20, 1999, one week before the hearing began, and received April 24, 1999 now received as JX 3B. Former JX 3 is now renumbered and received as JX 3A. Mrs. Becker's notes are marked and received as JX B.

shown to me there is a slight mark above the 2 that differs from that provided in his deposition; there is a smudge or erasure mark that appears around the "6" and extends above the "2," thus eliminating part of the mark above the 2 and resulting in a prominent change to the 6 when the numeral on the actual pad are compared with the Becker Deposition Exhibit (copy).

I have also considered that occasionally, although infrequently, Mr. Becker begins writing his number "2" with a line at the top of the two as follows: " ", so that, combined with a small " ", the number "20" looks like this " ", which is how the "20" looked in the copies of the deposition notes. This looks something like a "26" but it is not. The purported "original" hand written note for that date, now appears as a rather clear " ", with a smudge over the "6" and the upper part of the "2". These appear at the following dates in his notebook: 5/20, 5/21, 5/26, 8/24, 8/26, 8/27, 9/20 (appears virtually identical to the 11/20/98 entry in the deposition); also 9/21, 9/25, 9/26, 9/27, 10/20, 10/21, 10/26, twice (the second 10/26 appears almost identical to the 11/26 in the copies that I made to review these), 10/28, and 10/29 (three times).

Mr. Becker's mileage increase, in particular that of 10-30 for Cincinnati, Ohio, unload Cincinnati OH., unload, shows "515,265" with the 26, again appearing very similar to the 26 clearly entered into his "End Employment" entry in his notebook as opposed to the appearance of the 11/20/98 "End Employment" entry in the deposition. It is now my conclusion that the "11/20/98 End Employment" entry, as it appears in the deposition is different than "11/26/98 End Employment" entry in his notebook; that he changed that entry after his deposition and that the original entry was 11/20/98 on which he entered "End Employment." In this, it is my conclusion that this evidence supports the position that Mr. Becker intended to end his employment on 11/20/98.

I find that the original entry in the log book as reflected in the deposition copies of it stated "11-20-98. End Employment."

Post-Termination Communications

Mr. Becker was questioned about a conversation with Andie Vogt, who is the vice president in Human Resources, on November 20, 1998. (T 149) That meeting resulted in a letter dated November 20, 1998 from Ms. Vogt to Dale Becker which stated:

Many times when drivers quit West Side they don't give us the opportunity for an exit interview; although I am sorry you decided to take that action, I appreciate your taking the time to discuss your decision and give us your comments. After meeting with you and then talking with you on the phone, I did have the opportunity to meet with Brian Cruise and Terry Gholson. We are always striving to improve West Side and we appreciate your comments as they will definitely be taken into consideration. I wish you luck in your future endeavors and, as always, please remain safe. (JX 5)

Mr. Becker testified that he received the letter and in response to a question about whether he responded in writing to her statement that he had quit, and stated:

Maybe when I went to see her I told her that whatever was talked about there was not intended to be a quit. Maybe that's what she and I talked about, because I only remember holding the door open . . . (T 150)

On further questioning by the undersigned, Mr. Becker responded that he did receive the letter, but that he did not respond to it in writing. (T 150-151) With regard to the letter, Mr. Becker confirmed to Claimant's counsel that in his deposition (JH p. 125), he stated:

I don't care what you say. I am going to call your attention to – 11/20/98 as the day I came back from being on the road for 28 days. I was upset with these people about the meeting I had. I went home and the next day, Saturday, put this letter together so I could get this all photocopied from that specific paper from the photo place down there, whatever they call it. Then Monday morning is when I handed it to this gentleman, and everyone else's letter. (Depo p. 126)

However, Mr. Becker also testified that he did not have Ms. Vogt's letter of November 20, 1998, when he wrote his letter of the 21st. (T 156)

I find Mr. Becker's testimony about Ms. Vogt's letter and the basis for it to be equivocal and indefinite at best. I therefore have no basis for questioning the validity of the document as a basic reference of the position of the Respondent on Mr. Becker's action.

When asked why he asked a person with ultimate say so as to whether he was driving safely and he would endanger himself and his wife for loads that he claims he was so tired that he was falling asleep, Mr. Becker responded that he was in a situation where he was sick of having the dispatcher mad at him all of the time, being late and complaining about being late, and he just wanted to be able to get the load there at 10:00 the next morning. He stated that he regreted that because he was half asleep and did fall asleep; and that if his wife hadn't been along, he would have had an accident, because she screamed and he had gotten way over on the shoulder of the road at one time. (T 186) When asked whether he had called Mr. Whitney to state his condition, he simply stated that: "at 3:00 o'clock in the morning I wouldn't call anybody." (T 186) In response to my question "why?," he stated he just had enough respect not to wake somebody at 3:00 o'clock in the morning unless it was a life or threatening . . ." situation. (T 187) He confirmed that West Side had dispatchers on duty and claimed that they were not the ones that controlled what the daytime dispatcher tells them. (T 187) Mr. Becker then stated with regard to such calls that as follows in response to my question:

Q. Well, are you telling me that when you're on the road and you encounter a problem you can't call the dispatcher who's on regardless of what time it is?

A. No, you can call at anytime, but that particular time when I called in at 6:00 o'clock about having to wait until after midnight, I'm going to be too tired to be able to drive it down there that night. The dispatcher that was on duty said, well, I can't tell you what to do because he said it's

Ted's load. Ted is the dispatcher, its Ted's load.

Q. So are you telling me you did call?

A. Well, certainly I did call my dispatcher. And when I got down to this place here, to the Newlywed's food place in Arkansas here, and they told me I'd have to wait all those hours. Well, I called the Cedar Rapids terminal, told them that they should make a note to tell Ted in the morning that I was going to be late. Okay. Then at midnight or whatever here, well, around 1:00 o'clock in the morning, I called and told them I got loaded.

* * *

I finally had gotten loaded, and then I had had a few hours sleep, and that I was going to try and get my delivery at 10:00 o'clock in the morning, but I didn't know if I could stay awake to get there at 10:00. And he said he didn't know what to tell me because it was Ted's load. I did the best I could. And then that's when I called my broker that they're angry about. Because the brokers says be sure to call me when you get loaded. (T 188-89)

Mr. Becker was then asked about these calls and said he would call if there was an accident and that he would call about situations that might be threatening to himself or to the public (T 189), and that he did not make such a call at 2:00 and 3:00 o'clock in the morning on that trip. (T 189) When asked whether he would call when he was tired during the daytime, he said there were times but he never did call Mr. Whitney during those times either. (T 189)

Mr. Becker's actions in driving illegally when falling asleep without calling management, calling a consignee without permission and changing the notebook date from 11-20-98 to 11-26-00 casts his entire testimony concerning the issue of whether he quit, or, as he quoted it, "End Employment" into doubt. I am therefore unable to credit his testimony on any of the key issues.

West Side Transport Operations' Manager Brian Cruise testified that he has worked there for approximately six and a half years and oversees the daily operations of the truck fleet. (T 209) He makes sure there is compliance with the law, abiding by customer's wishes, and taking care of the drivers. (T 209-10) He described his duties as "getting them where they need to be, getting them home when they need to get home, making sure that they're satisfied with their work conditions. (T 210)

He held the same position in 1998, at which time he had fleet managers, and the nine weekend dispatch personnel under his supervision. (Ibid)

The fleet managers dispatch and manage a fleet of 40-45 trucks and drivers. (Ibid) In 1998, West Side had policies and procedures to ensure the drivers operated their vehicles within the legal limits in regard to hours.

The basis policy was that the company “abide by all federal regulations at all times.” (T 211) He stated that when they get into a situation where they think someone is not operating in conformance with those regulations, they react immediately. (Ibid) There is a training period for drivers when they come on board. (Ibid)

West Side does [not] have other terminals - just central dispatch at this time. (T 211) It has 520 trucks, and each manager manages 40-45 trucks. (T 212) Maintenance is done at Cedar Rapids, and other maintenance is done on the road through vendors. (T 212)

For the safety of the drivers, every day a fleet manager audits what the driver has done. This is a constant process involving review of the driver’s log recap on the computer screen. It has a Customer Service Planner/fleet manager type system so that the fleet manager can gather the information as to what the driver can do at his next available time, considering his available hours. The planners work with the pool of freight to try to match that up with what the driver has available for his hours. (T 213) Drivers call and contact him on many occasions, often when someone’s unhappy. (Ibid)

In 1998, if drivers believed they were too tired, Mr. Cruise testified, that the “safety policy is always to operate the vehicles in a safe manner.” (Ibid) If a driver indicated that it was unsafe to continue driving, the company response would be to “shut the truck down so we can get a repower or a relay to rescue the load.” (T 214) With 520 trucks on the road, their options involve whether to seek out other drivers not currently on road assignment or who are on change load assignments that would allow them to have more than enough time to complete the load assignments; (that is switch load assignments to match up a little better, and take care of problems as they arise), or to use the last alternative which is to reschedule a customer. (T 214)

I credit this testimony and find that the driver policy in 1998 was as stated by Mr. Cruise.

With regard to Mr. Becker, in 1998 he would have met with him within a few days of being hired. (T 215) Originally, he had a fleet manager by the name of Teresa Zimmola, who was involved with the decision to transfer Mr. Becker from Ms. Zimmola to Ted Leslie. (Ibid) Mr. Cruise testified that he “wasn’t very happy with her and he had some abusive names for her at one point.” (T 215) Mr. Cruise stated there was definately a personality conflict and Mr. Becker made his feelings toward her very well known. (T 216)

The problem was resolved by switching his fleet manager to Mr. Leslie, who was, at that time, what they called a “Mother Hen, Fleet Manager.” (T 216) He would work as such with the newer drivers, and try to develop them into the system. He felt at the time that Mr. Becker was jumping to conclusions about the system, and how it worked, rather than understanding how it actually worked. (T 217)

At a later time, he became aware that there were personality conflicts with Mr. Leslie as well. (Ibid) He stated that he did not “think Mr. Becker was happy with West Side Transport’s segment of the trucking business,” and that he was “second guessing or trying to guess what happened upstairs” in their Operations Department rather than understanding it and learning it. (T 218)

Mr. Cruise explained that since Mr. Becker did not seem to understand that they had a Customer Service Planner/fleet manager type of system, so that when he went into a certain area, they would have planners looking at inbound trucks and getting information from the fleet managers as to what the driver has available or where the driver wanted to go, where he needed to go, and that sort of thing. Mr. Becker thought that there were people there that were out to get him. (T 218-19) The correct procedure would be if Mr. Becker had to stop for whatever reason, he would call his fleet manager and they would take the action from there. (T 219) Concerning the types of complaints they were getting from Mr. Becker, he might be directed to arrive at 8:00 and the consignee would be open until 4:00 o'clock, but when he got there at 8:00 - the representative would say you have 15 loads ahead of him and you might have to wait until the afternoon. (T 221)

With regard to a driver who calls and says that he is tired and he needs to sleep, Mr. Cruise testified that they would say to park the truck, let us know where its parked, and they will see if they can get somebody to "take the load off." (T 223) They have computer programs that can search the satellite system and it will tell how many trucks are within 50 or 100 miles, etc. (T 223)

Mr. Cruise remembered two conversations in November with Mr. Becker. One involved a face-to-face conversation in early November, and another when Mr. Becker called very upset, and Ted Leslie called him in and told him that he had enough of this shit. And he wanted to be routed in because he had an application in at GSTC." (T 224) I find that while there is some confusion about the time in relation to other events that followed, this conversation took place as stated by Mr. Cruise, and by Mr. Leslie; that it remained uncontradicted on the record by Mr. Becker, and that as a result he was routed into the West Side terminal.

Three to five days before that, he met with Mr. Becker and went to talk to the fleet manager about the conversation in which Mr. Becker reportedly "advised his fleet manager that Dale requested to be routed in so he could turn in his truck." (T 225) With regard to Mr. Leslie and himself, supposedly Mr. Becker had a load to deliver in Maryland with a 9:00 o'clock a.m. delivery point at which he arrived on time. (T 225-26) When he arrived he learned that the consignee had until noon to arrive there. (T 226) Mr. Becker sent a message saying that West Side was not a "very smart operation." Mr. Cruise said that he did not believe that Mr. Becker had any basis for his complaint, after he reviewed what they provided him with, he had plenty of time to arrive but "he was upset again that he had a couple of hours that could have stopped and had breakfast before he delivered." (T 226) With regard to that trip itself, that Mr. Becker "asked me to be routed in so he could turn in the truck." (T 227) In their terminology, turning in the truck means "quit." (Ibid) As a result of the request, Mr. Cruise testified, Mr. Leslie, in fact, complied with his request and routed him back to Cedar Rapids. (T 227) Mr. Becker arrived back on the evening of the 19th.

The meeting with Mr. Cruise took place on the 20th. When Mr. Cruise met it was with Terry Golson and Dale Becker. He and Mr. Becker had had a conversation approximately two - to two and a half - to three weeks before that, in which he had tried to explain to him some of the things he was upset with Ted about, concerning how they did business. On November 20th, Mr. Becker stated "basically what he was upset about and why he was quitting." (T 229) Mr. Becker "was upset and angry with Ted . . .," and didn't like the fact that they had the schedules, they were discussing things like "why we would tell him to go in at 8:00 o'clock

when . . . we knew darn good and well that the customer was open until 4:00 o'clock. (T 229-30) After a half of hour to 45 minutes of the meeting, Mr. Cruise said to him "maybe

your resigning is for the best. Maybe, you know, maybe this isn't the right business for you." (T 230) In response, Mr. Becker said: "[w]e'll see what Mr. and Mrs. Vogt think about that" (T 230-31), and he walked out.

In response to my question about who first brought up the question of quitting, Mr. Cruise stated that he did not recall. I questioned Mr. Cruise that he was "characterizing what was said rather than saying what was said" and cautioned him that did not help me. At this point, I had to question Mr. Cruise in detail to determine what was said by Mr. Cruise to Mr. Becker. He responded: "I believe I asked him . . . something along the lines of what's going on, what's . . . the issue." He could not recall exactly what was said. Mainly he said that at the time he was in transit and talked to Mr. Cruise, Mr. Becker stated, "I had enough of this shit. I've got an app (appointment) in at GSTC, you route me in so I can turn my truck in." (T 234)

Then when he met with him on the 20th sometime before noon, possibly closer to 7:00 a.m., after battling back and forth for awhile, Mr. Cruise reputedly stated "Dale, maybe this is for the best . . . maybe this just isn't the right business for you," after which he stated that he would see Mr. and Mrs. Vogt to see what they had to say about it and stormed out of the room. (T 235-36) In terms of his impression about what he meant, Mr. Cruise stated that "my impression was that he didn't like the way I was handling it." (T 236) Later, Mr. Cruise talked to Mrs. Andie Vogt and he asked her what was going on after which she stated that he had quit. (T 237)

Mr. Cruise testified that at no point did he terminate Mr. Becker. He stated that West Side never terminated anyone or adversely affected their employability because they called in indicating that they couldn't drive due to fatigue. (T 237) On cross examination, Mr. Cruise confirmed that Mr. Becker might have wanted to talk to Mr. Vogt to have things clarified as to whether or not he wanted to be an employee at West Side. (T 240) He did not recall whether the word quitting came out of Mr. Becker's mouth. When asked whether he ever had somebody get upset and quit and change their mind or say that they are going to quit and later change their mind, he confirmed that that had happened. (Ibid) He also admitted that they would want to keep a driver who had never had an accident in a commercial vehicle and never had a moving violation. (T 241)

Mr. Cruise confirmed on cross examination that there were variances in schedules and that lead-times were taken into consideration along with speed limits and hours of service, including traffic, weather, getting stopped at inspection stations, and truck spills along with loading and unloading time being longer than expected. (T 242-43) Other situations included the driver being awake all day and off-duty awaiting a dispatch; and then given a time when it's time to go to sleep, for which they try to account. For this, they have a mileage chart that they use for planning and booking freight, and try to use their appointments from the time using the chart from the time that the load is locked and loaded. (T 243) Mr. Cruise admitted that he would not be happy if he was told to arrive with a truck at 8:00 a.m. and it wasn't unloaded until 4:00 p.m. (T 244) At the time when Mr. Becker worked, the employer West Side Transport would find drivers for late deliveries, but they do not do that any longer. (T 244)

Mr. Cruise was shown a record of Disciplinary Actions and Termination, Late Deliveries, the scale of fines (JX 6, p. 5-1, T244) noting that after four late deliveries the driver could be fired. (T 245) Employer's counsel stipulated that the book was in effect in 1998. (T 245) In responding to the question as to whether there is tension between getting the load on time and safety, Mr. Cruise stated that if there is anything that's going to delay what is happening, the driver needs to communicate so that they can make alternative plans, which they do every day. (T 245)

Mr. Cruise testified that they had some problems with Mr. Becker's communications; that he wasn't communicating enough. (T 247) He also confirmed that West Side Transport reported to DAQ Services that Mr. Becker was an excessive complainer. (Ibid) Mr. Cruise testified that he had a history of not communicating on the right issues and the right methods. (T 248) Mr. Cruise testified that West Side does rely on DAQ reports in its hiring decisions. (Ibid) Larger trucking companies make hiring decisions based upon the DAQ reports.

Mr. Cruise testified that the reason Mr. Becker was not eligible for rehire by West Side Transport was, "because he was verbally abusive with my fleet managers, he was verbally abusive with safety people, he didn't conduct himself professionally." (T 249) Mr. Cruise testified that while he never fired him for it, they "conferenced with him about it." (Ibid)

In addition, West Side has a point system for late deliveries related to driver negligence which would include the driver not doing his job of driving the unit to the customer and communicating if there was an issue. (T 250-51) Mr. Becker was instructed on such matter. (T 251)

Mr. Cruise was a credible witness. I credit his testimony in its entirety.

Safety Director, Tim Whitney, whose testimony I also credit, provided he had been Safety Director for approximately seven years (T 253), and discussed the policies involving any complaints with DOT regulations, OSHA regulations, driver conferences and whatever was needed to meet those goals. (T 253) Mr. Cruise called him when they are dealing with safety issues, and usually by phone, sometimes in person (T 254), some of the calls are transferred to his house, it was a weekend or after hours' situation. (Ibid) Instructions to dispatchers and fleet managers are there to contact Tim regarding any collisions or where they feel there is a safety issue involved. He was involved in the newly hired driver orientation in 1998 in which compliance with DOT regulations, the ten-hour driving rule, the 15-hour on-duty rule, and the seven-day hour driving rules were all emphasized. (T 255) They were also included in the handbook and discussed as part of a three-day orientation program (Ibid), set the form for a new driver. (T 256)

These situations where the drivers are on the road are brought to his attention, and the policy is to convey to drivers through orientation, newsletters, satellite messages, that the policy is that if they're tired, shut down, and call in and get their rest. (T. 256) He was not aware of any driver being disciplined for such a call if they were having problems staying awake. (Ibid) He is available 10 or 12 hours a day and always carries a pager and a phone. (T 256-57)

He recalled one instance where Mr. Becker contacted him about taking medication that he thought might make him tired, and he advised him of his policy, and contacted the person that does their physicals asking information about the medicine that Mr. Becker was taking. He found out that it should not affect his driving. (Ibid) Apparently, there was no adverse consequence to Mr. Becker about this call. (T 257)

On cross examination of Safety Director Timothy Whitney by Mr. Taylor discussing the fact that the driver is the person in the best position to determine whether or not he can safely run, West Side wants to rely on the driver to make that determination whether its safe, unless they are “lonely” and “tired”, he tells them not to run, that safety violations do take place, and that’s why he has log audits. (T 287)

A driver cannot drive more than 10 hours without first having an eight hour break. (Ibid) An eight hour break for which may consist of a combination of off duty and sleep berth time. (T 293) Teams may use a “split sleeper berth rule” during the eight hour break drivers have to do normal every day things such as taking a shower, shaving, grabbing a meal, etc. as confirmed by Mr. Whitney as a reason why they were looking into extending the time to ten hours. (T 294) He confirmed that the eight hours does not necessarily allow for eight hours of sleep. (Ibid) Mr. Becker confirmed his signature on the orientation verification form (RX G) (T 296-97), and confirmed that questions were asked and answered about fatigue during the orientation, including a movie on it. (T 297) He also identified some question and answer situations that were presented during the orientation. (T 297-98) This includes a scenario on not having enough time to make the delivery and ending with a direction to call dispatch in such a circumstance. (T 299)

I credit the testimony of Mr. Whitney.

Fleet Manager Ted Leslie testified that his duties at West Side were “basically to ensure the driver’s wants and needs” and to listen the drivers on a daily basis, dispatch drivers, make sure they get home on weekends, listen to any problems that they have, and try to solve them. (2T 7)⁹

In 1998, he performed the orientation procedures. Among other things, Mr. Leslie said they emphasized communications with dispatch about any problems. (2T 8) Mr. Leslie besides the safety issues stated that he emphasized: “I don’t care about the truck, the trailer, or what’s in [it], or how valuable the cargo is, we care about the safety of the driver behind the wheel or the pedestrians out on the road. If you have to shut down for any reason, you do so and communicate with dispatch.” (2T 9) I credit this statement. It was not denied by Mr. Becker, as a company policy. Mr. Leslie also described the videos or movies discussed previously and the tests that were given (2T 10-11), emphasizing they were not to drive fatigued or over hours, or under any other circumstances that would be unsafe. (2T 11-12) He also discussed the turnover of drivers, and the attempts to lower that. A program called “mother hen” was implemented to deal with the above issues (2T 13-14), from 150 to 50 percent turnover.

⁹Designations to the second day of transcripts will be designated 2T.

Mr. Leslie testified that Mr. Becker was assigned to him in 1998, after a discussion with Mr. Trpkosh, Vice President of Operations at West Side. (2T 17) At that time, he was solely responsible for the new drivers on top of being “Mother Hen”, so it was unusual procedure for him to take on a driver that had been assigned to another dispatcher for awhile. (Ibid) As Vice President of Operations, at that time, Mr. Trpkosh told him that Mr. Becker, “constantly went through every dispatcher in the system at West Side’s system, [and] I was his last chance as far as the only dispatcher that didn’t have Dale Becker.” (2T 19) Mr. Becker had some problems with other dispatchers. (Ibid)

The first communication with Mr. Becker was one in which he called him from some place in Oklahoma City, Oklahoma. (2T 21-22) He was traveling from Texas to Grinnell, Iowa which is supposed to be delivered the following Tuesday. Mr. Leslie asked Mr. Becker what his intention was to deliver the load on Tuesday and go home “underneath the load, which would be ok.” Mr. Becker said no, he was going to drop the load at the CR terminal and deliver one Saturday morning. (2T 22) Mr. Leslie testified that he looked at the load again, and questioned him telling him “Dale, you’re over 600 miles away from the CR terminal, how are you going to deliver this load, drop this load at the CR yard, and deliver a load early Saturday morning and be legal and safe.” (2T 22-23) Mr. Becker responded, “well I’m going to do like I usually do and just throw my logbook on the floor.” Mr. Leslie testified he asked him to hold and went into Mr. Craig Trpkosh’s office and told him exactly what Becker had said, Craig said to transfer him to the office. At this point, Dale got on the line with Mr. Trpkosh who “proceeded to . . . chew him out.” (2T 23) Mr. Trpkosh told him several times “we do not do this at West Side, we do not run illegal, we do not run unsafe. Do it legally or you will not be working here.” At this time, Mr. Leslie testified on further questioning from the undersigned that he was in Mr. Trpkosh’s office talking on the speaker phone, but he heard both sides of the conversation. With regard to running unsafe or running illegally, he told Mr. Becker more than once that they do not tolerate that at West Side, running over hours or throwing logbooks on the floor. He was also told that if he did it that way he would no longer be working at West Side. (2T 25)

With regard to this trip, Mr. Leslie did not know how Mr. Becker completed the trip. (2T 27) I credit this account. It is consistent with Mr. Trpkosh’s testimony and the actions that were taken.

When asked what the character of the relationship with Mr. Becker was during his time at Fleet Manager, from the beginning of October through the end of his employment, Mr. Leslie testified that it was “frustrating”, that he was “a very hard gentleman to deal with,” and that complaining was “a continuing on thing with Dale. He was never happy on where he was going, I tried very hard to put Dale on loads that he liked to do. Dale liked to run to Texas, and as many times as I possibly could I’d put him on a Texas load. If I tried to put him on something else he was unhappy about it. He was unhappy about the loading time, and how long it took to load it. . . . He was sometimes unhappy too long transit time, but we implement transit time for what the miles are on the trip.” (2T 28)

As trip manager, he “[t]ried to talk to him, tried to reason with him. There was no pleasing him.” (Ibid) Mr. Leslie testified that during the time when he was Fleet Manager, Mr. Becker did not complain to him about being fatigued when driving his loads. (2T 29) With regard to driving while fatigued, Mr.

Leslie testified that they were supposed to call dispatch immediately and at which time he would tell them to shut down, and they also had said that in orientation. (2T 32) He testified that:

I never reprimanded a driver for shutting down, because it was unsafe to drive due to weather conditions, hours, fatigue, mechanical, never. I encouraged it. If they had to do that, do it. I was upset with drivers if they didn't call me and tell me that. (Ibid)

With regard to contacting customers, he verified that Mr. Becker violated the policy on a trip to Texas where he was supposed to deliver at 5:00 a.m. in the morning, and Mr. Becker called saying he was 60 to 75 miles away from the destination. (Ibid) He testified that Mr. Leslie said to him:

I'm sitting down and having breakfast, I don't care when the load gets there. I've already called the customer and made other arrangements. (2T 34)

In response Mr. Leslie told him that was not their policy to do that, and it was his job as the customer service person to do it. He told him he needed load down there ASAP, whatever it takes to get down there. Mr. Leslie testified that he asked Mr. Becker if he "was too tired to do it, or was out of hours," and Mr. Becker responded "... no." (Ibid) It was Mr. Leslie's understanding that Mr. Becker did leave the breakfast table, went down and delivered the load. (2T 35) I fully credit Mr. Leslie's account of this conversation.

Mr. Leslie testified that just before Mr. Becker's employment ended, he recalled receiving a call from him when he was in Pennsylvania under a dispatch, and called up very frustrated. Mr. Becker "told me he's had it. I was f'ing nuts, that he was going to, he wanted to come in and quit, run him back to CR." (2T 37) I credit Mr. Leslie's account as consistent with that of Mr. Cruise.

Mr. Leslie transferred the call to Brian Cruise to handle it, and Mr. Cruise gave him instructions after his conversation with Mr. Becker to "route Dale in that he was quitting." (Ibid) At this point, Mr. Leslie testified that they loaded Dale to Chicago and dispatched him under a load coming to Cedar Rapids. The next time, later on that week that he saw Mr. Becker on Friday, he was walking in the hallway on his way back to the recruiting area. (2T 38) Mr. Leslie knew that Mr. Becker had talked to Mr. Golson and to Mr. Cruise, and talked to both of them. Mr. Leslie was at his desk and saw Brian and Mr. Golson walking the hallway. He went out and asked them what the status was with Dale and Brian said that "he is resigning, he's quitting." (2T 40) That was the last time he saw Mr. Becker or talked to him. (Ibid) Again, I credit the fact that Mr. Becker was rerouted back to Cedar Rapids as enforcing the view that he was quitting his employment at West Side.

Mr. Leslie testified that the normal procedure for terminating someone that's under his control is for he and the supervisor to be told that there was to be a termination and he would tell Mr. Cruise or Mr. Golson. At that point, he would turn in the truck keys to either Mr. Cruise or himself (Mr. Leslie) and that's it. (2T 40-41) Decisions to terminate are joint decisions. If he implements it - he talks to Brian or if it's a safety issue - he talks to Mr. Whitney, and they make joint decisions. (2T 41) No employee has ever been terminated without first talking to him, and that is a procedure understood. No members of management ever talk to him about

terminating or firing Mr. Becker. (Ibid) In response to my question, Mr. Leslie stated that at no time were any steps taken or records made of any steps that they intended to terminate Mr. Becker. (2T 41-42)

Mr. Leslie testified that he left West Side Transport approximately nine months before the hearing. He now lives in the Quad cities. He was at the time commuting to Cedar Rapids and he received \$10,000 more a year to move. (2T 42)

Mr. Leslie explained that a DAQ report, a “disposition of drivers and why they leave” report, on which at West Side it or the employee fills it out to be forwarded to other truck lines to look up the reasons that a driver left a place. (2T 43) He testified that West Side uses and reports to DAQ services “sometimes” and that nothing was provided to DAQ services concerning Mr. Becker. (Ibid) He did not know why Mr. Becker was not eligible to be rehired at West Side Transport. (2T 45)

With regard JX 2, Mr. Becker’s log dated 11/5/98, loading in Springdale, Arkansas and traveling to Mount Pleasant, Texas, Mr. Leslie stated that the report showed six hours, a reasonable amount of time for driving from Springdale, Arkansas to Mount Pleasant, Texas. (2T 49) The records show that he was loaded at 2:00 a.m. and they wanted him in there at 5:00 a.m. (2T 49-50) Mr. Leslie confirmed that he was upset that Mr. Becker had not made the 5:00 a.m. appointment in Mount Pleasant, Texas on November 5, 1998. (2T 57) When asked whether it would be reasonable to assume that Mr. Becker would have been fatigued if he had a 5:00 a.m. appointment, Ted Leslie responded that “he certainly should have been concerned about that, and he should have been calling dispatch.” (2T 50) Mr. Leslie verified by the entry that they found in the log that this was the first day he ever talked to Mr. Becker, some time on October 2 or 3rd. (Dallas, TX through Chocktaew, OK through Missouri to Cedar Rapids) (2T 52) Mr. Leslie wanted to make clear that he did not initiate dispatch Mr. Becker on that load, and got him after the fact somewhere in Oklahoma.

In discussing what he said about tearing up logbooks and throwing them on the floor, Mr. Leslie confirmed that Mr. Becker stated that he would just throw his logbook on the floor and go like he usually does. Mr. Leslie was not aware that Mr. Becker was the type of driver who committed hours of service violation or one who ran more or less miles than a typical driver that he supervised. (2T 56) (Drivers average approximately 2,300 miles per week.)

When asked why drivers would not want to be rushed on a load, i.e., from Springdale, Arkansas to Mount Pleasant, Texas, he confirmed that one reason might be fatigue, the fact that they are entitled to a break, the fact that they have to clean up, and that they need time to eat, and sleep. (2T 60-61) In terms of situations where he did not want to be rushed, Mr. Becker told Mr. Leslie that he did not want to drive after 9:00 at night. (2T 62) The trips had to be planned efficiently to do that, including figuring amounts of mileage over 500 miles as a two-day trip, and that leaving the house in proper time to plan it legally and safely, where you would be running short of hours and running short of time to make the trip. When asked whether Mr. Becker was late for other trips than the 5:00 a.m. delivery in Mount Pleasant, he stated that it always depended on the time he left his house and he was always in trouble with making transit time, and “always too tired on the other end.” (2T 64) When asked how he knew that, Mr. Leslie testified that he did not know what affect his being too tired was with he

didn't like to drive at night after 9:00 p.m., that he needed his sleep, and that at one point he had his wife with him on the trip. (2T 65-66)

Randy Sheal, Director of Driver Development for CRST International, of Cedar Rapids, Iowa, in 1998 and 1999, and testified that he was in charge of the Recruiting Department, hiring drivers for CRST. (2T 68) CRST has 900 trucks which they run as a team in the van division, and have 400 trucks that run solo. They have approximately 2,300 drivers. In 1998-1999, they had a shortage and were out looking and advertising for drivers. (2T 68-69)

With regard to the DAQ report (CX 1), if they had a driver who had 15 years of driving experience and no speeding violations and no known accidents, he testified that he would have hired the driver in 1998 or 1999. The DAQ Report (CX 1) says, "Work record, excessive complaints" for Mr. Becker, Mr. Sheal testified that this would not have prevented them from extending an offer of employment to him (Ibid), based upon his ten to fifteen year safe driving history and being a recent driver in a truck. (2T 71-72) He stated that they would have been counseled that they were aware of the statement of complaints and counseled him accordingly, but they would have still made the offer. (2T 72)

I credit the testimony of Mr. Sheal.

Mr. Becker testified on re-direct examination with regard to the throwing of the logbook on the floor and denied that he said that he was going to throw the logbook on the floor. He stated the following about the logbook:

The conversation about the logbook he [Mr. Leslie] and I had the very first day I met him [in] person at the West Side terminal, and I hadn't even hauled a load yet under his dispatch. And I was telling him that I was thankful to be hired by a company that was telling me that they would have strictly legal. Then I told them years ago when I first started driving truck back in the '60's, it was a matter of fact that you were expected to just simply lay your logbook aside. And in fact, I didn't even use logbooks back in the '60's. And that was the only conversation we had about a logbook being thrown on the floor was in the terminal at West Side Transport the day that he introduced himself to me that he was going to be my Fleet Manager in the lunchroom. (2T 85)

In cross-examination, with regard to the term "throw my logbook on the floor" meant he would falsify logs to which Mr. Becker replied, "It means throwing it on the floor, it means laying it aside and not even using it at all, sir." (2T 86) He acknowledged that if the logs didn't reflect accurately the miles done, then this is essentially falsifying the logs. When asked "you did falsify logs prior to talking to Mr. Leslie and that's why you told him you would just throw the logs down like you had done in the past?" (2T 87) Mr. Becker denied that he had. (Ibid) Referring to his deposition where he responded to the question; "then I take it you are telling me you did not falsify logs before talking to Mr. Leslie?", (2T 88) he stated "I'm going to tell you that I don't remember making any statement like that." (Ibid) At this point, Mr. Becker was asked:

Q. How often did you falsify logs that you knew were a violation of DOT regulations to falsify them?

A. Quite often, and other drivers had to.

Q. "I want to know about you. So you intentionally . . ."

A. "Many times, sir. Many times."

Q. "So you intentionally falsified logs?"

A. "To keep . . ."

Q. "Excuse me. Knowing that you were going to violate the law. Is that correct?"

Q. And your answer was, "I did anything to get the loads hauled on time."

(2T 89-90)

Mr. Becker recalled that he did give those answers to the questions asked (2T 90), and that they were, in fact, true statements when he provided them back in February.

When asked in re-direct whether he ever falsified logs at West Side, he testified "Yes, I did." He stated that it was not routine, but it happened. (2T 91) When asked by the undersigned whether there was any conversation with Mr. Leslie that day about throwing logbooks on the floor, he first answered "absolutely not certain. Only when I explained," then he muddled the response by saying with response to "I'm asking about that day?": "No sir. Absolutely not, and I'm under oath." (2T 92) When then asked whether he had a conversation with Mr. Trpkosh about the matter, he answered: "I can't say. I can't say it."

From the testimony of Mr. Becker, I conclude that it is inconsistent and evasive and may not be credited on very key points. When asked to confirm whether or not he made the statement to Mr. Leslie that he would throw the logbook on the floor; I conclude that he did make such a statement and that Respondent's concern about him properly reporting when he was "running illegal" was justified. Mr. Becker would misrepresent his condition when it fit his circumstance. He could not be trusted.

CONCLUSIONS OF LAW

The Surface Transportation Assistance Act ("STA" or the "Act," herein) prohibits discharging an employee because

(A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . . or

(B) the employee refuses to operate a vehicle because

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §§ 31105(a), often referred to as Section 405 of the Act.

These activities, which are referred to as “protected activities,” are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.¹⁰

Generally, in order for a claim under the Act to proceed, a complainant must first make out a *prima facie* case showing that the employer and employee are covered under the Act, that the employee engaged in a protected activity under the Act, and that the employee was terminated or otherwise discriminated against as a result of this protected activity. *Mace v. Ona Delivery Systems, Inc.*, 9 1 STA-10 @ 3 (Sec'y Jan. 27, 1992).¹¹ Normally, the respondent then has the opportunity to rebut the *prima facie* case by showing it had a non-discriminatory reason for disciplining the complainant. *Green v. Creech Brothers Trucking*, 92-STA-4 @ 7 (Sec'y Dec. 9, 1992) *remanded on other grounds* (Sec'y Dec. 7, 1993). However, where the employer asserts a non-discriminatory reason for discharge during its case, the *prima facie* step can be skipped, and I may proceed directly to the next step: deciding whether the employer's reason is pretextual. *Olson v. Missoula Ready Mix*, 95-STA-21 (Sec'y Mar. 15, 1996); *Pittman v. Goggin Truck Line, Inc.*, 96-STA-25 @ n.2 (ARB Sept. 23, 1997) (citing *Carroll v. Bechtel Power Corp.*, 9 1 -ERA-46 (Sec'y Feb. 15, 1995), *affd sub nom*, *Carroll v. U. S. Dept. of Labor*, 7 8 F. 3 d 3 5 2, 3 5 6 (8th Cir. 1996)). See also, *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999), for a general overview of the standards and burdens for claims arising under Section 405 of the Act.

¹⁰For instance, attempts by Mr. Becker to get West Side to change its policies on scheduling trips to include more pay or sleep time for loading and other delays may have invoked the protective provisions of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (3).

¹¹Citations to administrative decisions are citations to the official copies of the decisions found in the Office of Administrative Law Judges on-line law library, which is accessible through the Internet at <http://www.oalj.dol.gov/library.htm>. Record documents that may be referenced by the undersigned, have been marked as ALJX 1-5.

In addition, in *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999), the ARB adopted the ALJ's recommended decision, but noted in regard to the ALJ's analysis of a *prima facie* case: "In a case fully tried on the merits, ... [i]t is not particularly useful to analyze whether the complainant established a *prima facie* case. ... Rather, the relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints."

Initially, I find that there is no dispute that the respondent is covered by the Act. West Side does not challenge that it is covered by the Act. See 49 U. S. C. § 3 110 1. Nor do I find that there is a question of whether Mr. Becker engaged in protected activity. I do find, however, that the parties differ about what qualifies as protected activity under the Act. Some activities Mr. Becker assumes are protected are not, while some activities West Side presumes are not, are protected. Since I also find that Mr. Becker did "quit," *i.e.*, that he did voluntarily "End Employment" at West Side on November 20, 1998,¹² the question remains, however, whether, in accepting Mr. Becker's voluntary action, or refusing to either reinstate him, or refusing to accept his application for re-employment, West Side impliedly discharged him in retaliation for his protected activity, in violation of the Act. The latter assumes that West Side had an obligation to reinstate him; that the refusal to do so constituted an "adverse action" under the Act; that it was motivated by his protected activity, and that it was prohibited by the Act, as a pretext for taking an adverse action against him. For the reasons stated herein, I find, as a matter of fact and law, that West Side has not engaged in an adverse action against Mr. Becker in accepting his "quit," and that in refusing to rehire him or continue his employment, Respondent has articulated a legitimate business reason for its action, and therefore, has not violated the Act.

The Secretary has recognized a clear distinction between the concept of a "constructive discharge" and a termination where the complainant was not "formally" discharged, the issue being whether the complainant was "forced to resign" or whether he "quit voluntarily." *Nathaniel v. Westinghouse Hanaford Company*, 91-SWD-2, pp. 8-9, 1995 WL 848011 (DOL Off. Adm. APP., Feb. 1, 1995) In the former, constructive discharge, the complainant must establish that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." By the Complainant's own position as stated at the hearing, such conditions were not established here. (Ibid.) There was no "constructive" discharge. There also were no words of discharge; that is, no West Side official told Mr. Becker that he was discharged. This leaves, for purposes of this case, only one possible position, which I reject: that there was an "implied" discharge, for which neither authority, nor sufficient facts, are presented.

¹²The above discussion on whether he did end his employment on November 20, 1998 as opposed to November 26, 1998 (*Supra* p.p. 11-13) will not be repeated here. Suffice it to repeat, as in the factual determination set forth above, that in changing the date of the entry in his log to "11-26-98" from "11-20-98" for his following entry, "End Employment," Mr. Becker affected his credibility in this case. I have concluded that he intended to, and did, voluntarily end (quit) his employment on 11-20-98, when he had himself rerouted back to Cedar Rapids to do so, rather than completing his assignment; and that he changed the date so that it would not appear that he did intend to end his employment at that time.

As an additional consideration, if some form of discrimination may otherwise be established, Nathaniel makes it clear that in a “voluntary quit”

situation, “[u]nless constructively discharged, a complainant is not eligible for post-resignation damages and back pay or for reinstatement.” (*Ibid.*)

Mr. Becker’s complaints to West Side management about its trip scheduling and planning were such that it was causing him to be tired or “fatigued,” within the meaning of the Act, and, therefore, qualifies as protected activity. Complaints do not have to be made to an outside agency in order to be protected. Internal safety complaints also qualify. *Pittman v. Goggin Truck Line, Inc.*, 96STA-25 @ 2 (ARB Sept. 23, 1997); *Davis v. H.R. Hill, Inc.*, 86-STA-18 @ (Sec’y Mar. 19, 1987). Mr. Becker’s complaint is similar to that found in *Pittman*, where the complainant, a truck driver, after driving the truck, complained to members of management that he was tired (fatigued) due to its planning and scheduling. (*Id.*) Mr. Becker complained to a member of West Side management that the scheduling and failure to take all matters into consideration, such as delays at consignee locations, made driving his vehicle unsafe. As in *Pittman*, and contrary to the view of West Side, this would qualify as protected activity.

The comments Mr. Becker made to management about working more hours than expected and needing more time off in such circumstances, also qualify as protected activity. Federal regulations prohibit operating or requiring or permitting a driver to operate a commercial vehicle "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § § 392.3. Had Mr. Becker refused to operate his vehicle because of his fatigue, he would have clearly been engaged in protected activity.¹³ *Self v. Carolina Freight Carriers Corp.*, 91-STA-25 @ 3 (Sec’y Aug. 6, 1992). As noted, the Act also recognizes complaints relating to safety regulations to be protected activity under the Act. 49 U. S. C. § § 3 1105 (a)(1)(A). It is uncontested that Mr. Becker and West Side supervisors discussed his position that he was working more hours than he expected. As excessive driving or driving while fatigued would constitute of the regulations, I find these complaints are related to safety regulations, and thus constitute “protected activity.”

However, as stated above, I have found that Mr. Becker did, indeed, voluntarily quit his employment by requesting or demanding that he be rerouted by West Side’s dispatcher, back to its Cedar Rapids terminal and that it was not a constructive discharge. In West Side’s compliance with that request, I also find that Mr. Becker has not established by a preponderance of the evidence, that the refusal allow him to continue working, or to rehire him, was for anything but the legitimate business reasons advanced by West Side for so doing. Mr. Becker’s request or demand to be rerouted back to the terminal, and the fulfillment of that request was in the nature of a contract, with the “consideration” being the cost of, and the effort in, his being rerouted back to the terminal. In exchange, Mr. Becker got exactly what he requested: that he be

¹³Remarkably, in those of the four occasions listed where he did start to fall asleep and almost had accidents, he did not pull over and stop to sleep, and did not call for relief. In other words, West Side management was not provided notice for the most serious safety violations including fatigue. Mr. Becker, himself, by continuing to drive was engaging in safety violations and violations of company policy which alone, would justify either a discharge or refusal to rehire him.

rerouted back to the terminal to complete his quit. It is my conclusion that the minute he arrived back at the terminal, West Side had fulfilled its part of the bargain, and that, under the circumstances - peculiar to this case alone - the “quit” was effective, with no further obligations attendant to it on the part of Respondent. (The fact that West Side may have rehired one or more other drivers who had quit on an individual basis, does not establish either a binding practice, or an obligation to do so, absent evidence that a specific practice had been invoked and denied the Complainant in this case. There was no such evidence, other than the fact that West Side had hired, at some unstated time in the past, one or more other drivers who had quit.)

Employer witnesses testified that they did not discharge Mr. Becker, and there is no testimony by Mr. Becker that he was told that he was discharged by them; that, upon being rerouted to the Cedar Rapids terminals requested by him, he sought out various supervisors and officials to discuss the conditions that angered him, and that he wrote the six page letter on November 21st that resulted in other discussions. In none of these discussions, however, did he discuss his actual work status, *i.e.*, whether he was still considered to be employed there.

Regardless of what his own assumption might have been, it was, at best, merely a gratuitous assumption, that remained unconfirmed throughout the discussions, even to the point of having failed to ask whether he was or not. Not doing so could be construed as either evidence that he was still employed, as seems to be the position of the Complainant, or it could also be construed that he might agree to withdraw his “quit” notice and to keep working for West Side if its officials would satisfactorily address his issues. I find that the weight of the evidence favors the latter position: it was a factual “quit.” Mr. Becker was angry at the failure to satisfactorily address his issues, to that point in time. He asked to be rerouted because he was dissatisfied with the answers, and was quitting his employment at West Side. Mr. Becker’s subsequent conversations constituted negotiations to achieve a different result. He was unsuccessful. Management did not agree. Mr. Becker is no longer employed at West Side. The fact that Mr. Becker failed to raise or discuss his status after having been rerouted in pursuant to his declaration of “quit,” may not be projected upon the Respondent as its failure, when at all times it acted consistently in the actions of its officials that they considered him to have quit his employment at West Side.

In explanation for its refusal to rehire Mr. Becker, or to continue his employment, West Side maintains that it had no obligation to rehire him; that its refusal to do so was not as the result of these complaints, but because of the way he continuously acted toward West Side’s employees and members of management when he did so. In so responding, West Side has offered (articulated) a legitimate business reason for its actions. West Side’s sole obligation in response to Mr. Becker’s allegations in this matter, was to “articulate” a non-discriminatory business reason for the refusal to do so. Under the circumstances, it need not have “proven” that this was the reason, *Shute v. Silver Eagle Co.*, 96-STA- 19 @ 2 (ARB June 11, 1997), but it is my opinion that it has done so. It remains Mr. Becker’s burden to show that this reason was not credible or that it was pretextual, and that it was for the retaliatory purposes alleged. Mr. Becker was a relatively short term employee at West Side. Basically he contested the system that management used to run its operation from the outset of his employment, there. His letter of November 21st recounts that fact. In reply, he simply has failed to meet his burden by a preponderance of the evidence. It is my conclusion,

however, that Mr. Becker offered insufficient credible evidence to the accounts offered by Mr. Leslie and Mr. Cruise about this conduct, and by so doing, he basically set himself up for the result of his quit. He did so voluntarily, and is saddled with the result.

In summary, the protected activity at issue in this case involves the internal complaints about being tired from poor scheduling and trip planning by management. The alleged “adverse action” for that protected activity, however, is an alleged discharge, which I find did not take place. Linked to this position of the Complainant, is the alleged failure West Side to either continue Mr. Becker’s employment at West Side after he had quit, or to rehire him - neither of which it had any obligation to do under the circumstances of this case. As stated above, it is my conclusion that Mr. Becker voluntarily quit his employment at West Side, as a matter of fact.

As a consequence, I find that Mr. Becker has not proven that he was discharged for engaging in protected activity, and therefore that he is not entitled to the whistleblower relief set forth in the Act. His claim must therefore be denied.

ORDER

For the above stated reasons,

IT IS HEREBY ORDERED that the complaint of Dale A. Becker under the Surface Transportation Assistance Act is DISMISSED.

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE:

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. *See* 29 C.F.R. §§ 1978.109(a); 61 Fed. Reg. 19978 (1996).

